

NOTICE

Memorandum decisions of this Court do not create legal precedent. See Alaska Appellate Rule 214(d) and Paragraph 7 of the Guidelines for Publication of Court of Appeals Decisions (Court of Appeals Order No. 3). Accordingly, this memorandum decision may not be cited as binding authority for any proposition of law.

IN THE COURT OF APPEALS OF THE STATE OF ALASKA

ALFRED WINSTON KEANU TUCKER,

Appellant,

v.

STATE OF ALASKA,

Appellee.

Court of Appeals No. A-11409
Trial Court No. 3AN-12-2816 CR

MEMORANDUM OPINION

No. 6307 — March 16, 2016

Appeal from the Superior Court, Third Judicial District,
Anchorage, Larry D. Card, Judge.

Appearances: Megan Webb, Assistant Public Defender, and
Quinlan Steiner, Public Defender, Anchorage, for the Appellant.
Eric A. Ringsmuth, Assistant Attorney General, Office of
Criminal Appeals, Anchorage, and Craig W. Richards, Attorney
General, Juneau, for the Appellee.

Before: Mannheimer, Chief Judge, and Allard, Judge.

Judge MANNHEIMER.

Alfred Winston Keanu Tucker was convicted of first-degree unlawful contact and first-degree witness tampering,¹ based on evidence that (1) Tucker telephoned his girlfriend, Lorelei Kugzruk, several times from jail after he was arrested for assaulting her, and that (2) Tucker asked Kugzruk to recant her accusation of assault.

¹ AS 11.56.750(a) and AS 11.56.540(a)(1), respectively.

At Tucker's trial, the State played excerpts of three telephone calls that Tucker made to Kugzruk from jail. On appeal, Tucker argues that the trial judge should not have allowed the State to play excerpts of these calls, but instead should have required the State to play the three calls in their entirety. Tucker also argues that the trial judge erred by prohibiting Tucker's attorney from introducing other portions of these same calls to provide context for understanding the excerpts that the State played for the jury.

We conclude that, in one instance, the judge potentially committed error when he refused to allow Tucker's attorney to introduce other portions of the calls that might have shed a different light on the statements that Tucker made to Kugzruk in the State's excerpts. Nevertheless, for the reasons explained in this opinion, we conclude that the trial judge's potential error was harmless.

Tucker also claims that the prosecutor violated a court order by inviting the jurors to consider Tucker's prior acts of domestic violence when the jurors determined whether Tucker was guilty of witness tampering. Although we agree that the prosecutor's comments were improper, we conclude that the impropriety was remedied by a limiting instruction that the jurors received at the end of Tucker's trial.

Underlying facts

Early one morning in March 2012, Kugzruk waved down a police officer on Northern Lights Boulevard in Anchorage. She told the officer that Tucker had assaulted her about thirty minutes earlier. More specifically, Kugzruk told the officer that Tucker had kicked her and had held her down and strangled her with his hands, to the point where she could not draw breath. The officer observed "ugly bruising" on Kugzruk's arms, so he took her to the hospital.

At the hospital, Kugzruk repeated her accusation that Tucker had strangled her. She also said that she was afraid, now that she had told the police about this assault. Photographs were taken of Kugzruk's injuries, which included bruises on her arms, legs, and breasts, and cigarette burns on her sternum.

Based on the foregoing, Tucker was arrested and charged with fourth-degree assault. The arraigning court ordered Tucker not to make contact with Kugzruk. But according to Department of Corrections records, Tucker made eighteen telephone calls from jail to Kugzruk's mother's residence. These calls were recorded by the Department of Corrections.

In three of these calls, Tucker engaged in conversation with Kugzruk. Tucker encouraged Kugzruk to tell the district attorney that he did not assault her — to say instead that she was drunk and angry when she reported the assault to the police. Tucker also encouraged Kugzruk to call his lawyer and provide assistance in getting the assault case dismissed.

Based on these three telephone conversations, Tucker was charged with first-degree unlawful contact and first-degree tampering with a witness.

Tucker's theory of defense was that he did not assault Kugzruk and that, in his conversations with Kugzruk, he was simply asking her to tell the truth.

Indeed, at Tucker's trial, Kugzruk recanted her accusation of assault. She testified that Tucker had not assaulted her, and that her statements to the police were untrue. She also said that she had been intoxicated at the time, and that she could not remember what had happened to her, or what she had told the police.

The jury was unable to reach a verdict on the fourth-degree assault charge. However, the jury convicted Tucker of first-degree unlawful contact and first-degree witness tampering.

In this appeal, Tucker challenges only his witness tampering conviction.

The litigation surrounding the State's request to play excerpts of Tucker's three telephone conversations with Kugzruk

The prosecutor at Tucker's trial told the court that he intended to play redacted versions of the three conversations between Tucker and Kugzruk. (The portions that the prosecutor intended to omit contained discussions of family matters such as transportation and car repairs, dental appointments, the children, Kugzruk's mother, and Tucker's pet chinchilla. The omitted portions also included discussions of Kugzruk getting treatment for substance abuse, and Tucker's and Kugzruk's expressions of love for each other.)

Tucker's attorney argued that the three telephone calls should be played for the jury in their entirety, so that the jurors would not take Tucker's statements out of context. The trial judge rejected this argument, ruling that the hearsay rule barred Tucker's attorney from introducing any of Tucker's out-of-court statements unless Tucker took the stand at trial.

This hearsay ruling was error: Tucker's attorney was not trying to introduce Tucker's out-of-court statements for the truth of the matters asserted. Rather, the defense attorney offered Tucker's statements to provide context for Tucker's other statements — the ones contained in the State's excerpts of the three conversations.

But the trial judge also issued an alternative ruling: he concluded that it was unnecessary for the jurors to hear any other portions of the three telephone calls because the prosecutor's excerpts were complete and understandable without further explanation, and thus there was no need to provide any further clarification of, or any further context to, Tucker's statements.

Tucker points out that the trial judge initially made this ruling without knowing the contents of the remaining portions of the calls. But this error was quickly corrected: When Tucker's attorney urged the judge to listen to the three telephone

conversations in their entirety, the judge agreed to do so — and agreed to reconsider his ruling. But after listening to the entirety of the conversations, the judge re-affirmed his earlier decision that the remaining portions of the telephone calls did not cast any different light on Tucker’s statements in the State’s excerpts.

We therefore conclude that, even though the judge committed procedural error when he made his initial ruling without knowing the contents of the omitted portions, this error was cured by the judge’s later actions.

Our analysis of the trial judge’s ruling on the completeness of the State’s excerpts

We have listened to the three telephone conversations between Tucker and Kugzruk in their entirety, and we agree with the trial judge that, with one potential exception, the prosecutor’s excerpts of the conversations do not portray Tucker’s statements unfairly or out of context.

The one potential exception that we have identified is the portion of one conversation where Tucker encouraged Kugzruk to talk to his lawyer to see how she could assist in getting the assault charge dismissed. In the State’s excerpt, Tucker’s encouragement to Kugzruk was followed immediately by Tucker saying, “See, Honey, a lot of stuff ... a lot of people got affected by this.”

The jurors might potentially have misinterpreted Tucker’s reference to “a lot of people [being] affected” by his situation, because the State’s excerpt omitted the fact that Tucker’s remark was prompted by Kugzruk’s telling him that his daughter missed him, and that Tucker’s pet chinchilla seemed to be depressed without him.

But Tucker has not shown that any of the other omitted portions of the recorded conversations were relevant to provide context to the State’s excerpts. Nor has he shown that the omitted portions would otherwise have been helpful to him in

defending this case. Given this record, we conclude that the one potential flaw in the trial judge’s “completeness” ruling did not appreciably affect the jury’s verdicts. To the extent that the trial judge abused his discretion in not allowing Tucker’s attorney to introduce the portions of the conversation we have described in the preceding paragraph, that error was harmless.²

The prosecutor improperly relied on Tucker’s history of domestic violence during his summation to the jury, but the trial judge cured this problem with a jury instruction

At trial, the judge permitted the State to introduce evidence of Tucker’s prior convictions for acts of domestic violence. The judge ruled, however, that these prior convictions were relevant only to the fourth-degree assault charge, and not to the charges of witness tampering and unlawful contact.

Despite this ruling, when the prosecutor delivered the State’s summation, he told the jurors that they could consider Tucker’s prior convictions when they decided whether Tucker intended to induce Kugzruk to provide false testimony. The prosecutor argued that Tucker’s prior convictions tended to prove that he had a motive to get Kugzruk to change her testimony — because Tucker had been through similar criminal prosecutions before, and thus he knew that the State would have a harder time convicting him if Kugzruk recanted her accusation of assault.

Tucker’s attorney objected to the prosecutor’s argument, and he asked the judge to specially instruct the jury that Tucker’s history of domestic violence could not be used as evidence of witness tampering. The judge had already been planning to instruct the jurors that they were not to consider Tucker’s prior convictions when they

² See *Love v. State*, 457 P.2d 622, 632 (Alaska 1969).

deliberated on the witness tampering charge and the unlawful contact charge, and the judge assured the defense attorney that this instruction would be given at the end of the case.

As the judge promised, he instructed the jurors at the end of the case (*i.e.*, after the attorneys delivered their summations) that Tucker’s prior convictions “[could] not be considered in determining whether the defendant tampered with a witness or committed unlawful contact.”

On appeal, Tucker concedes that the trial judge gave a proper limiting instruction, but he argues that this limiting instruction should have been given earlier — before the prosecutor delivered his rebuttal summation.

We conclude that the trial judge did not abuse his discretion regarding the timing of the instruction. Although the judge chose to include the limiting instruction among the rest of the jury instructions at the end of the trial, the judge told the defense attorney that this limiting instruction would be given, and the judge expressly authorized the defense attorney to refer to this yet-to-be-given instruction when the defense attorney delivered his summation to the jury. (The defense attorney chose not to mention this issue during his summation.)

We also note that Tucker does not appear to have been prejudiced by the prosecutor’s violation of the trial judge’s ruling (the ruling regarding the limited admissibility of Tucker’s prior convictions for acts of domestic violence). Under the judge’s ruling, the prosecutor was prohibited from arguing that these prior convictions gave Tucker a motive to try to get Kugzruk to recant her accusation of assault. But even if the jurors had never heard about Tucker’s prior convictions, it was obvious that a recantation would help Tucker, and that Tucker therefore had a potential motive to get Kugzruk to abandon her accusation of assault.

(Tucker concedes that the evidence of his prior convictions was admissible with regard to the assault charge — but this was the charge on which the jury was unable to reach a verdict.)

For these reasons, we conclude that the trial judge did not abuse his discretion when he included the limiting instruction among the other jury instructions that were given at the end of the trial.

Conclusion

The judgement of the superior court is AFFIRMED.